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No. 85-1588

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN GERMANN, *Petitioner,*

vs.

CITY OF KANSAS CITY, MISSOURI, HONORABLE RICHARD BERKLEY, ROBERT KIPP, JOHN WAAS, THOMAS LEWINSOHN, EDWARD WILSON, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Is the speech of a public employee serving as President of a public employee's Union allegedly addressed to an issue of public concern and allegedly uttered in the context of bargaining entitled to carte blanche First Amendment protection or must the interest of the employee in so speaking be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees?

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OPINIONS BELOW

Respondents adopt the Opinions Below cited by Petitioner.

JURISDICTION

Respondents adopt the Jurisdictional Statement of Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents adopt Petitioner's Statement of Constitutional Provisions involved.

STATEMENT OF THE CASE

Petitioner John Germann brought this action against the City of Kansas City, Missouri, the Mayor, Honorable Richard Berkley, the City Manager, Robert Kipp, retired Fire Chief John Waas, Personnel Director Thomas Lewinsohn and Fire Chief Edward Wilson. Suit was brought under 42 U.S.C. §1983 and §105.510 R.S.Mo. alleging violation of Petitioner's right to freedom of speech as secured by the First and Fourteenth Amendments to the Constitution of the United States of America, claiming that the City of Kansas City, John Waas, and Edward Wilson violated his constitutional rights by not promoting him to the management rank of battalion chief. Specifically Petitioner alleged that Defendants refused to promote him because of what he said as President of the Union and because of his Union Membership.

At all times material to this action, Petitioner held the rank of Fire Captain, the highest non-management position in the Kansas City Fire Department. Petitioner was also President of the Local Fire Fighter's Union, IAFF, AFL-CIO, Local No. 42 from January 1, 1976, to December 31, 1981. Respondent John Waas was the Fire Chief until his retirement April 6, 1980, and Edward Wilson was Waas' successor. Petitioner produced no evidence of any promotions made after April 6, 1980, thereby stating no factual basis for a claim against Defendant Wilson. Likewise, no claim was stated against the Mayor, the City Manager or the Personnel Director.

There were seven (7) battalion chief openings from September 21, 1977, to April 6, 1980, when Waas retired. During the period from September 21, 1977, to September 19, 1979, Petitioner was ranked Number One on the Bat-

talion Fire Chief Eligibility List. Petitioner was ranked third on a new eligibility list established September 18, 1979, however no appointments were made from that list. Whenever a battalion chief vacancy occurred, a certification list was prepared showing the current ranking of people on the Battalion Chief Eligibility List. Respondent Waas made seven (7) appointments from the certification list based on the September 21, 1977, Battalion Chief Eligibility List:

1. On May 22, 1978, the third person on the certification list was promoted.

2. On June 19, 1978, the second and fifth persons on the certification list were selected.

3. On August 28, 1978, the third person on the certification list was selected.

4. On January 29, 1979, the third and fourth persons on the certification list were promoted.

5. On April 23, 1979, the fifth person on the certification list was selected.

Respondent Waas considered Germann for each of these vacancies but did not promote him. Petitioner never filed a grievance with the City's Personnel Director. On December 6, 1978, Petitioner filed a charge of discrimination against the City, John Waas and the City Manager with EEOC alleging that he had been passed over for promotion because of race. Petitioner did not file a lawsuit within ninety (90) days after securing his "right to sue letter". On only one (1) occasion was Petitioner the only person skipped over to reach the person selected by Waas for promotion. On two (2) occasions Waas skipped over Petitioner and three (3) others to reach the name selected.

Petitioner was not the only person ranked in the top five (5) on the September 21, 1977, eligibility list who was not selected for promotion from that list. Two (2) of the original top five (5) names on the September 21, 1977, eligibility list were not selected for promotion during that period that the list was in effect. Petitioner was not promoted by Waas because (1) Waas reasonably believed that to promote Petitioner to management would threaten the efficiency, discipline and morale of the Fire Department; and (2) Waas reasonably believed Petitioner would not resign from the Union if promoted to battalion chief.

Waas' concern about the effect Germann's promotion would have had on Department efficiency, discipline and morale was based in part on a letter included in Petitioner's Petition as Appendix "E", in part upon a telephone conversation with Petitioner in 1978 and in part upon a mini-insurrection that occurred in early 1979 in the Fire Chief's office.

ARGUMENT

The decision below, is correct. There is no conflict or any other basis for further review by this Court. The decision below does not represent a conflict of position between the respective Circuits nor is there as substantial Federal question.

Petitioner argues that the Court of Appeals misconstrued and misapplied the standard established by the Supreme Court for assessing the degree of protection the First Amendment to the Constitution affords all public employees when speaking of issues of public concern citing the cases of *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and *Connick v.*

Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) as the basis for the correct standard. Identification of protected speech after *Connick* is a two-step process:

(1) The speech must have addressed "a matter of public concern", 461 U.S. at 143, 146, and

(2) Then, the interest of the employee in so speaking must be balanced against "the interest of the State, as an employer in promoting the efficiency of the public service it performs through its employees." *Pickering,* 391 U.S. at 568.

This "*Pickering* balance" as it has come to be known, looks at the following factors:

(1) The need for harmony in the office or work place;

(2) Whether the government's responsibilities require a close working relationship to exist between Plaintiff and co-workers (in this case between Petitioner and Waas) when the speech in question has caused or could cause the relationship to deteriorate;

(3) The time, manner, and place of the speech;

(4) The context in which the dispute arose;

(5) The degree of public interest in the speech; and

(6) Whether the speech impeded the employee's ability to perform his or her duties. *Germann v. City of Kansas City, Missouri,* 776 F.2d at 764.

Petitioner suggests that a close working relationship would not have been required between the fire chief and the battalion chief had Petitioner been promoted thereby negating any perceived threat to the efficiency, discipline and morale of the Fire Department. Such a position is

misplaced. Indeed, Petitioner in the case of *Germann v. City of Kansas City, Missouri*, 577 S.W.2d 54 (KCD 1978), mot. reh. or tfr. den. 1979 stipulated that l.c. 56:

> ". . . In the absence of the chief of the Fire Department, a deputy chief acts as chief. In turn, in the absence of a deputy chief, including absence due to acting temporarily as fire chief, a battalion chief acts as deputy fire chief. In addition, during weekends and certain week day hours, a battalion chief is the ranking officer on duty and is in charge of the Fire Department."

The Court went on to hold l.c. 56:

> "Clearly, the battalion chiefs occupy one of the most responsible positions in the Kansas City Fire Department and it is beyond question that an irreconcilable conflict of interest may well arise when they act as the officer in charge of the entire Department and hold union membership with the Fire Fighters. Decisions which must be made objectively for the best operation of the Department may be in opposition to a position assumed by the Union. For the reasons fully explained in *Elk Grove* (400 F.Supp. 1097 (N.D. Ill. 1975) aff'd unpublished order 539 F.2d 714 (7th Cir. 1976)). This Court holds "that the prohibition of battalion chiefs from holding membership in the same Union as the Fire Fighters they supervise serves a legitimate State interest and the restriction of their First Amendment rights is the least drastic restriction to accomplish this purpose."

The Trial Court in *Germann v. City of Kansas City, Missouri*, 579 F.Supp. 180, 184 (WD Mo. 1984) found:

> "Discipline and morale in the department depend on respect being shown to rank. Waas reasonably be-

lieved that the tone and content of this letter (Appendix "E") was personally insulting and an inappropriate response to his letter of May 6. (Appendix "A-3") Germann's letter confirmed Waas' belief that Germann did not respect him and would not work under Waas' leadership to implement the City's fire plan. Waas reasonably believed that the letter illustrated the threat Germann posed to a harmonious leadership team dedicated to implementing the City's fire department policy. . . In early 1979, after the January 29, 1979, promotions were announced, an incident occurred in Waas' office which further confirmed Waas' concern about Germann's suitability for promotion to battalion chief. Germann and Waas sharply differ on what happened at that meeting. Waas testified that Germann came into his office by himself and demanded to know why he had not been promoted to battalion chief. Waas declined to respond because of Germann's Hostile attitude. Germann then leaned over his desk, shook his fist at Waas, and called Waas a "chicken shit".

Germann testified that he went to see Waas both as President of the Union and personaliy to make inquiry about why he had not been promoted. According to Germann all Waas would say is that Germann had not been appointed because of "certain activities". Germann attempted to get Waas to agree that "certain activities" referred to Germann's actions representing the Union. Waas would neither admit nor deny Germann's suspicion. Germann denied that he called Waas a "chicken shit" and that he shook his fist at Waas. Germann conceded that he accused Waas of not having "guts" enough to state the real reason for not promoting him. Two Union officials

who testified that they were with Germann supported Germann's version of the meeting.

The Court is convinced that Waas' version is closer to the truth than Germann's. The emotions still evident in Germann's voice when he testified about the meeting strongly indicates that the discussion was not as calm as Germann's testimony would lead one to believe. The Court believes that Germann verbally attacked and berated Waas. Waas' dismay at the intensity of Germann's attack was still apparent as he testified about the event.[5] However, even if Germann's version of this meeting were entirely credible, Germann's accusation that Waas did not have the "guts" enough to give Germann the real reason for not appointing him substantiates the reasonableness of Waas' conclusion that to promote Germann to Waas' management team would threaten the institutional efficiency of the Fire Department.

5. An article in the Kansas City Star dated February 8, 1979, quoted John Tvedten a union official at the time, as follows: "He [Germann] went in there and told him [Waas] how the hog ate the cabbage." Tvedten testified at the trial that a hog goes after cabbage "vociferiously" (sic)."

Petitioner submits that this decision should be decided along the lines of *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir 1985), cert. pend. *Gonzalez* is distinguishable from Germann because of *Gonzalez's* lack of hostility to his superiors. The Court stated at 1303:

"When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the

content of the employee's message, but also by the manner, time and place in which it is delivered." *Givhan v. Western Line Consolidated School District*, 1979, 439 U.S. 410, 439 N. 4, 99 S.Ct. 693, 701 N. 4, 58 L.Ed.2d 619. We agree with the district court's conclusion that "there was nothing about the manner, time or place of Gonzalez's statement that would justify his dismissal". *Gonzalez was polite throughout his exchanges with the Commissioners' Court. He did not launch personal attacks on the commissioners.* At several points he offered to cooperate in amending the CAA procedures to meet the commissioners' wishes. As the district court found, Gonzalez's conduct could not be characterized as a "mini-insurrection". Cf. Connick, 461 US at 141, 103 S.Ct. at 1687." (Emphasis supplied)

It is quite clear that the May 11, 1977, letter (Appendix "E") was not the sole basis for the Trial Court's denial of relief. The Eighth Circuit Court of Appeals in denying "protected status" to the May 11 letter correctly applied the balancing tests mandated by *Connick* and *Pickering*. The Court went on to find that it was unnecessary to perform a *Pickering* analysis of the 1978 telephone conversation or the 1979 name calling incident but noted that these incidences are indicative of Appellant's continuing hostility and disrespect for Waas.

Judge Heaney's dissent found the majority opinion to be "unadulterated nonsense" and the record capable of supporting a diametrically opposed result. Where there are two (2) permissible views of the evidence, and the District Court has carefully analyzed the demeanor and credibility of the witnesses, the standard of review is the "clearly erroneous" standard. This was most

recently enunciated in the case of *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); F.R. Civ. P. 52; which held that when findings are based upon determinations regarding the credibility of witnesses, Rule 52 F.R. Civ. P. demands even greater deference to the Trial Court's findings; for only a Trial Judge can be aware of the variations in demeanor and the tone of voice that bears so heavily on the listener's understanding of the belief in what is said. This Court should not countenance a personal attack on a superior, and a vociferous mini insurrection to be protected under the First Amendment to the United States Constitution thereby mandating the promotion of a perceived disloyal subordinate.

CONCLUSION

The ruling by the Eighth Circuit Court of Appeals does not present an important question of Federal law unsettled by this Court or one in conflict with the applicable decisions of this Court or a case otherwise calling for the supervision of the Supreme Court of the United States. The Petition should therefore be denied.

Respectfully submitted,

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